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No. _____ (1) 07-894

In The

Supreme Court of the United States

RICHARD W. HOYLE,

Petitioner,

vs.

ADA COUNTY, IDAHO, DISTRICT COURT;
LAWRENCE WASDEN, Attorney General,
State of Idaho,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the new rule established by the Court below, which permits a judge or reviewing court to look at the circumstances behind the return of a unanimous not guilty verdict after the jury is excused, vitiate the long standing principles behind the Double Jeopardy Clause that a not guilty verdict, even if erroneously entered, bars a retrial of a defendant?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Richard Hoyle respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is published at *Hoyle v. Ada County*, 501 F.3d 1053 (9th Cir. 2007). A copy of the opinion is attached hereto in the Appendix at A-1. On October 4, 2007, the Court of Appeal denied rehearing. A copy of the order denying rehearing is attached hereto in the Appendix at 54.

STATEMENT OF JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 U.S.C. § 1254(1). The federal district court had jurisdiction under 28 U.S.C. § 2241.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution Amendment V: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

STATEMENT OF THE CASE

1. Course of Proceedings

Mr. Hoyle was charged in state court with numerous felony counts including one count of racketeering pursuant to Idaho Code § 18-7804(a)(b)(c). Before the case reached the jury, almost all the charges were dismissed. After jury trial, a "not guilty" verdict on the racketeering charge was returned which is the subject of this appeal. Despite the jury verdict marking Mr. Hoyle "not guilty" of the racketeering count, the trial judge held that written notations on the verdict form indicated that the jury could not reach a decision on this charge, and he therefore denied Mr. Hoyle's motion for acquittal after the jury had been dismissed.

On appeal in state court, the Idaho Supreme Court affirmed the trial court ruling in a 3-2 decision. A petition for rehearing was denied by the same vote.

Mr. Hoyle then filed a Petition for Writ of Habeas Corpus in federal district court. After briefing, but without argument, the Court denied the petition. The denial of the petition was affirmed by the Court of Appeals.

2. The Facts Surrounding the Verdict Returned by the Jury

Mr. Hoyle proceeded to jury trial in state court on a second amended indictment alleging the following charges: Count A – Soliciting the Destruction of

Evidence; Count B – Racketeering, alleging 123 predicate acts;[1] Counts C, D, F, G, and H – Misappropriation of Premium Funds; and Count E – Solicitation of Grand Theft. "Not guilty" pleas were entered to all charges.

Trial on this amended indictment began on April 5, 1999. During trial, pursuant to motions by the state and appellant, the trial judge dismissed Counts C, D, F, G, H, and all but thirty predicate acts.

On June 9, 1999, after thirty-nine days of jury trial, the remaining charges, Counts A, B and E, were submitted to the jury. The jury was requested to fill out specific answers on Count B. At midnight on June 11, 1999, the jury advised the court that they could not reach unanimous agreement on certain "predicate acts." The jury retired for further deliberation and returned with their written verdict about an hour later.

The jury returned a "not guilty" verdict on the racketeering charge count B as well as on counts A and E, and made a notation on the verdict form below Count B "except as to the seven predicate acts upon which we could not reach unanimous agreement." The jury was polled and confirmed that this was their unanimous "not guilty" verdict. (A copy of the verdict form is at Appendix 27-33.) Rather than entering a judgment of acquittal on the racketeering charge, as

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[1] The original indictment alleged 165 predicate acts.

he was first inclined to do, the trial judge instead declared a mistrial.

Mr. Hoyle is currently facing trial on five charges which were originally alleged as predicate acts using the same evidence as in the original trial.[2]

3. Facts Underlying the Charges

Mr. Hoyle owned and operated a successful insurance agency in Boise, Idaho from 1979 to 1995. As an agent, Hoyle Insurance assisted in placing individuals in policies with numerous insurance companies, who provided the actual insurance coverage. The agency placed over twelve million dollars in insurance policies each year. Hoyle Insurance received commissions from insurance companies for the polices placed. In addition, Hoyle Insurance made contact with the insurance companies when customers had loss claims. Hoyle Insurance was one of the largest agencies in Idaho and as a result of that position had the underwriting authority to bind the insurance companies for coverage in certain instances.

In 1996, Mr. Hoyle sold the agency to First Security Insurance. After the sale, First Security, using a different accounting method, claimed that there were irregularities in Hoyle's practices. Mr.

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[2] If the jury acquitted Mr. Hoyle of the racketeering charge, the prosecution is barred from bringing him to trial on the predicate acts now charged as substantive offenses. *State v. Hoyle*, 99 P.3d 1069, 1073 (Idaho 2004).

Hoyle was thereafter indicted on the felony charges, including the racketeering charge which was based on 165 predicate acts alleged to have been committed during the operation of the agency.

Before and during trial, all but 30 predicate acts allegations were dismissed. The jury found that 23 of the acts did not occur and could not reach agreement on seven acts. Hoyle Insurance was a multi-million dollar agency; yet the losses from the alleged improprieties involved in these seven acts were no more than between $500 and $2500, a tiny part of the millions of dollars in policies written by the agency each year.

REASONS FOR GRANTING THE PETITION

In rejecting the long established principle that a jury's return of a "not guilty" verdict requires the entry of a judgment of acquittal even if the verdict is marked in error, the Ninth Circuit adopted a new rule which permits a reviewing court to examine notations on the verdict form as well as the "context of the verdict" to determine whether the jury intended to return a "not guilty" verdict. In doing so, the appellate court acknowledged that there was no prior case law allowing such an after-the-fact interpretation of a "not guilty" verdict.

The proper application of the Double Jeopardy Clause in the context of "not guilty" verdicts is a question of great importance especially in light of the

complexity of questions which are presented to jurors, not only in racketeering cases, but also in continuing criminal enterprise charges and murder cases alleging special circumstances. Juries today are often faced with complex verdict forms and the rule established by the appellate court here vitiates the well-established law that the return of a "not guilty" verdict overrides all other possible interpretations of a verdict form. Review is thus required to assure that the established Double Jeopardy law in this area is not undermined by a rule allowing a trial judge to interpret what the jury might have meant by marking the verdict form "not guilty."

ARGUMENT

The Ninth Circuit created a new rule of law permitting a reviewing court to interpret a "not guilty" verdict by trying to infer what was in the minds of the jurors at the time the verdict was returned in the trial court:

> We thus adopt a rule that a reviewing court may look to notations on a verdict form, other than surplusage, to clarify the jury's intent and the effect of its verdict in order to ascertain if the defendant has been acquitted of a particular charge. In addition, in cases where the jury has written notations on the verdict form, but in *only* those cases, a reviewing court may look to the context of the verdict, including jury requests for

> clarification, a trial judge's instructions, polling of the jury, and other court proceedings evidenced in the record that bear on a reasonable interpretation of what the jury has intended in its annotated verdict.

Hoyle v. Ada County, 501 F.3d at 1063 (emphasis in original; footnote omitted), Appendix 21.

However, prior case law from this Court, as well as other state courts, forbids trial judges and reviewing courts from engaging in this type of analysis where the jury returns a "not guilty" verdict. *See*, *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Burks v. United States*, 437 U.S. 1, 16 (1978) [Courts must "necessarily afford absolute finality to a jury's *verdict* of acquittal – no matter how erroneous its decision. . . . "]; *Green v. United States*, 355 U.S. 184, 188 (1957); *Sanabria v. United States*, 437 U.S. 54, 71 (1978) and *Smith v. Massachusetts*, 543 U.S. 462, 467 (2005) [acquittal is "a resolution, whether correct or not, of some or all of the factual elements charged."]; *Petitti v. State*, 100 P. 1122 (Ok. Ct. App. 1909) [improper to have mistaken "not guilty" verdict impeached by testimony from jurors.]; *Stow v. Murashige*, 389 F.3d 880 (9th Cir. 2004); *State v. Zwiefelhofer*, 880 P.2d 58 (Wa. App. 1994) [jury foreman mistakenly marked "not guilty" rather than "guilty" on verdict; judgment of acquittal cannot be corrected after discharge of the jury.]; *Bigelow v. Superior Court*, 256 Cal.Rptr. 528, 533 (Ct. App. 1989) ["The absolute power of the jury to acquit, for reasons consistent or inconsistent, is beyond dispute

in our criminal justice system."]; *People v. Soto*, 212 Cal.Rptr. 425 (Ct. App. 1985) [jury's return of "not guilty" on murder but fixing murder as a second degree barred retrial on murder charge.].

A verdict of acquittal will not be disturbed even if based on a flawed understanding of applicable legal principles. *Arizona v. Rumsey*, 467 U.S. 203, 211 (1984). "It has, of course, long been the rule that consistency in verdicts or judgments of conviction is not required." *United States v. Hamling*, 418 U.S. 87, 101 (1974) and *United States v. Powell*, 469 U.S. 57, 64-68 (1984). Moreover, a verdict will stand even though it may be the result of jury carelessness or compromise. *United States v. Dotterweich*, 320 U.S. 277, 279 (1943).

Indeed, the Ninth Circuit opinion does not cite a single case where a jury marked "not guilty" on the verdict form and the reviewing court was permitted to "interpret" the verdict based upon notations on the form or the trial court record. Instead the opinion relies upon three distinguishable cases which permitted this type of analysis in the context of trying to interpret "guilty" verdicts. But the interpretation of such verdicts does not involve the application of the Double Jeopardy Clause or any other constitutional principle. *Hoyle v. Ada County*, 501 F.3d at 1062-1063.

Relying on these guilty verdict cases, the opinion establishes a new rule of law, permitting a reviewing court to look behind the verdict form when "not

guilty" is marked on a verdict form. This new rule violates the Double Jeopardy Clause and the cases interpreting this basic constitutional principle.

The opinion concludes that its view of the facts surrounding the return of the verdict is the only proper one, rejecting two state judges' conclusion that there are alternative interpretations of the "not guilty" verdict and the notations on the verdict form. Idaho Supreme Court Justice Eismann concluded that there was another extremely *reasonable* interpretation of the notation which would uphold the "not guilty" finding despite the notation:

> The jury was not required to unanimously agree upon the predicate acts in order to return a verdict of not guilty on the charge of racketeering, however. If the jury unanimously concluded that the State had failed to prove one element of the racketeering charge (such as a pattern of racketeering activity), then it must return a verdict of not guilty to racketeering regardless of whether it unanimously agreed upon any other element (such as the predicate acts). To find someone not guilty, the jury need not unanimously agree that the State has failed to prove all of the elements of the crime charged. It need only unanimously agree that the State has failed to prove one of the elements of the crime. *Thus, the jury could return a verdict of not guilty to racketeering even though it could not unanimously agree upon the seven predicate acts, which is what the jury did in this case.* The jury was not deadlocked on the

> racketeering charge. It was deadlocked on seven predicate acts, which were simply elements of the racketeering charge. It was unanimous, however, that the State had failed to prove racketeering.

State v. Hoyle, 99 P.3d 1069, 1079 (Idaho 2004) (Eismann, J., dissenting) (emphasis added).

The Ninth Circuit concurred in Justice Eismann's conclusion that the jury could not agree on whether the state proved that Hoyle committed the seven predicate acts. But the appellate court fails to concede that the jury could have acquitted on the racketeering charge without even agreeing on the predicate acts or that this is a *reasonable* interpretation of the "not guilty" verdict on the racketeering charge.

Indeed, as this Court has observed an acquittal "actually represents a resolution, correct or not, of *some* or all of the factual elements of the offense charged." *Smith*, 543 U.S. at 468 (emphasis added). Thus, the jury may well have found the other factual elements of the racketeering charge unproven, but marked the predicate acts upon which they could not agree in compliance with the trial judge's instruction and noted that on the verdict form.

To have a trial judge or reviewing court impose its view of reasonableness on a "not guilty" verdict vitiates the underlying principles of the Double Jeopardy Clause in an unprecedented manner and invades the province of the jury which can return a "not guilty" verdict for any reason. In fact, the opinion

improperly attempts to interpret the jury's deliberations and verdict in several different ways: 1) the jury's leaving blank an answer to Question 1C "reasonably must mean that the jury did not reach this issue and that it was deadlocked on the issue of Hoyle's commission of the seven predicate acts," *Hoyle v. Ada County* 501 F.3d at 1065; 2) the jury "ultimately checked 'not guilty' at the bottom of the special verdict form in response to sub-Question 1F because the special verdict form *required* the jury to do so in the event of a negative answer to sub-Question 1A" *Ibid.* (emphasis in original); and, 3) "[t]he notations on the verdict could *only reasonably* mean that the jury could not reach a unanimous verdict of Count B as to the excepted seven predicate acts because it could not agree on whether Hoyle committed the seven predicate acts." *Ibid.* (emphasis added.)

Each of these statements in the decision demonstrates that the appellate court improperly invaded the province of the jury in violation of well-established law that a jury's "not guilty" verdict cannot be reviewed by any court. It was simply not for the panel or any court to delve into the minds of the jurors to interpret the verdict. *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) ("A reviewing court can only engage in pure speculation – its view of what a reasonable jury would have done. And when it does that, 'the wrong entity judge[s] the defendant guilty.'")

The Ninth Circuit attempts to limit the scope and significance of its new rule:

> Our holding does not undermine the robust Double Jeopardy jurisprudence recognizing that where a verdict form states simply "not guilty," courts may not inquire into the surrounding context to determine the jury's intent. As we have stated time and again, a "not guilty" verdict is a "not guilty" verdict, even where we strongly suspect a jury mistake, or even an "egregious error." *See Stow*, 389 F.3d at 890-92 (citations omitted). Here, only because the verdict form itself was ambiguous may we engage in further investigation to determine the jury's intent.

Hoyle v. Ada County, 501 F.3d at 1063, n. 6.

Yet, this attempt to limit the far-reaching application of the rule is not convincing. Given the increasingly complex nature of the questions presented to jurors, this rule creates a wealth of potential problems which may well overwhelm, and thus implicitly overrule, the long-standing precedent that a "not guilty" verdict controls in all circumstances. Special verdicts are increasingly common in cases where juries are required to find all facts beyond a reasonable doubt which might increase the maximum penalty for the offense. *See, e.g. Apprendi v. New Jersey*, 530 U.S. 466 (2000); and *Blakely v. Washington*, 542 U.S. 296 (2004).

In addition, this opinion would undermine the holding of state cases like *Bigelow* and *Soto* where the

jurors returned potentially inconsistent verdicts. In *Bigelow*, the jurors marked "not guilty" of murder but then found a special circumstance that the murder was committed in the course of a felony. *Bigelow v. Superior Court*, 256 Cal.Rptr. at 529. Similarly, in *Soto*, the jurors found the defendant "not guilty" of murder but found that the murder was a second degree murder. *People v. Soto*, 212 Cal.Rptr. at 427. In both cases, application of the new rule announced by the Ninth Circuit would permit the trial judge or reviewing court to look behind the "not guilty" verdict "to ascertain if the defendant had been acquitted of the particular charge." *Hoyle v. Ada County*, 501 F.3d at 1063. Yet, in both of these cases, the state appellate courts applied the principles of the Double Jeopardy Clause to prohibit such an examination and held that the "not guilty" verdict controlled, barring retrial on the murder charge.

The new rule abandons the bright-line rule established in Double Jeopardy jurisprudence in favor of a case-by-case examination by the trial judge or reviewing court. This rule not only abandons the prior law; it also creates the potential for the trial and appellate courts to invade the province and decisions of the jury and change the verdict of a trial in a wide range of cases. This type of power given to a judge eviscerates the foundations of our judicial system that places primary importance on the role of the jury in deciding cases. The final verdict of "not guilty" by the jury must be upheld in all circumstances in order

to retain the essential function of the jury pursuant the our Constitution.

This Court should grant review to re-affirm the significance of the jury's "not guilty" verdict and to foreclose the expansive application of the rule permitting a judge's interpretation of a jury's "not guilty" verdict.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Richard W. Hoyle,

Petitioner-Appellant,

v.

Ada County, Idaho, District Court; Lawrence Wasden, Attorney General, State of Idaho,

Respondents-Appellees.

No. 06-35509

D.C. No. CV-05-00063-EJL

OPINION

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted
March 6, 2007 – Portland, Oregon

Filed August 2, 2007

Before: Ronald M. Gould, Richard A. Paez, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Gould

COUNSEL

Andrew Parnes, Ketchum, Idaho, for petitioner-appellant Richard W. Hoyle.

Jessica M. Lorello, Deputy Attorney General, Boise, Idaho, for respondents-appellees Ada County and the State of Idaho.

OPINION

GOULD, Circuit Judge:

Petitioner-Appellant Richard W. Hoyle was indicted in Idaho on state racketeering charges. By the time the case was submitted to the jury, two counts remained in addition to thirty alleged predicate acts for a third count involving a racketeering charge ("Count B"). After the jury told the trial judge that it could not agree on a number of predicate acts in Count B, the trial judge instructed the jury to note on a special verdict form where there was no agreement. The jury returned a not guilty verdict on the racketeering counts, but wrote "no agmt" next to seven predicate acts and wrote under the "not guilty" verdict, "except as to the seven predicate acts upon which we could not reach unanimous agreement." The trial court denied Hoyle's motion for acquittal, concluding that the jury qualified its verdict with respect to the seven excepted predicate acts in Count B, a ruling which the Court of Appeals of Idaho and the Idaho Supreme Court affirmed. Hoyle filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241(c)(3), claiming that the not guilty verdict served to acquit him of the entirety of Count B and that Respondent Ada County ("the State") was barred by the prohibition against double jeopardy from

charging in a second prosecution that Hoyle committed five of the seven predicate acts as discrete and independent offenses. The district court denied relief because it found that the jury unambiguously excepted the seven predicate acts from its not guilty verdict. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

Hoyle owned and operated Hoyle & Associates Insurance, Inc. ("Hoyle Insurance") in Boise, Idaho from 1979 to 1995. On January 1, 1996, Hoyle sold Hoyle Insurance to First Security Insurance, which continued to operate the concern as Hoyle Insurance and employed Hoyle as Vice President and Sales Manager.

On June 12, 1997, Hoyle was indicted on eight felony counts that were predicated on 165 criminal acts allegedly committed in connection with his insurance company. When the case was submitted to the jury, the jury had left to consider just Count A alleging solicitation of destruction of evidence, Count E alleging solicitation of grand theft, and thirty alleged predicate acts under Count B for various racketeering conduct.[1] On June 11, 1999, after ten

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[1] The State charged Hoyle in Count B under Idaho Code Ann. § 18-7804(a), which provides in pertinent part:

> It is unlawful for any person who has received any proceeds derived directly or indirectly from a pattern

(Continued on following page)

weeks of trial and three days of deliberation, the jury reached verdicts of not guilty on Counts A and E. With respect to the remaining Count B, the jury sent a note to the trial judge stating in relevant part: "As to Count B, we cannot reach a unanimous agreement on a number of predicate acts. Do you want us to note on [the] verdict form those predicate acts to which we cannot agree? We have made extensive effort to obtain an agreement and don't feel we can." After hearing from the jury that further deliberations would be fruitless, the trial judge instructed the jury to

> fill out the verdict form. . . . On those answers to charges, to questions, and to predicate acts on which you have unanimously agreed, . . . put in your decision or answers to those questions. On any questions or predicate acts on which you do not unanimously agree, please . . . write down next to that "NA" for no agreement.

These instructions to the jury comported with Idaho law, *see* Idaho Code Ann. § 19-2307, and with defense counsel's request. In light of the jury's note, however, Hoyle's counsel moved for a mistrial, which was taken

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of racketeering activity in which the person has participated, to use or invest, directly or indirectly, any part of the proceeds or the proceeds derived from the investment or use thereof in the acquisition of any interest in, or the establishment or operation of, any enterprise or real property.

under advisement pending the announcement of the verdict.

At 12:47 a.m., on June 12, 1999, the jury returned its verdict to the judge, who read its contents into the record and polled the jury to confirm its verdict as to the matters on which the jury had and had not agreed. The verdict form as to Count B, with italicized text to reflect the jury's action and any handwritten comments on the form, reads in relevant part:

> 1A. – Did the defendant commit at least two incidents of racketeering conduct? *The jury checked "No," but noted "except as to the seven predicate acts upon which we could not reach unanimous agreement."*
>
> 1B. – Check the appropriate box to reflect your verdict with respect to each of the following predicate acts. *The jury checked the "not guilty" boxes for twenty-three predicate acts, but wrote "no agmt" beside the boxes provided for Predicate Act Numbers 9, 10, 11, and 62 (which pertained to grand theft); and Predicate Act Numbers 108, 115, and 118 (which pertained to insurance fraud).*
>
> 1C. – Did the incidents of racketeering conduct that you find were proven have the same or similar incidents, results, victims, methods of commission or were they otherwise so interrelated by distinguishing characteristics that they were not isolated incidents? *The jury provided no answer.*

> 1D. – (If your answer to either question 1A or 1C is "NO," then you must answer both parts of 1D "NOT GUILTY.") Considering your answers to the foregoing questions under the heading "Count B," and considering all the other required elements of the crime of racketeering, you must decide whether the state proved or failed to prove beyond a reasonable doubt that the defendant committed the crime of racketeering under the "investment" theory and the "participation" theory. *The jury checked the "not guilty" box as to both the investment and participation theories, but wrote underneath its verdict "except as to the seven predicate acts upon which we could not reach unanimous agreement."*[2]

The trial court entered a judgment of acquittal on Counts A and E and twenty-three predicate acts under Count B. Hoyle then filed a Motion for Judgment of Acquittal on Count B, and the State filed a Motion for a New Trial on Count B. On August 11, 1999, the Idaho district court denied Hoyle's Motion for Judgment of Acquittal and granted the State's Motion for a New Trial, ruling that the jury had not returned a verdict on the entirety of Count B in light of the seven predicate acts on which it could not agree.

On August 17, 2000, the State informed the trial court that it would not proceed to retrial on Count B

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[2] The jury form, in its entirety, is attached to the opinion as Appendix A.

because it was filing a second prosecution under Case No. H0000795 ("Case 795"). Case 795 charged Hoyle with five of the seven predicate acts as separate and independent offenses. The State indicated that it would move to amend the indictment in Case 795, and, if granted, would move to dismiss the first case involving the racketeering charges in Count B. On the date of retrial, September 11, 2000, the trial court denied Hoyle's renewed Motion for Judgment for Acquittal and dismissed the racketeering charges without prejudice.

The Court of Appeals of Idaho held that the trial court did not abuse its discretion in denying the Motion for Judgment of Acquittal based on the determination that the jury did not return a unanimous verdict on all the predicate acts under Count B. The Idaho Supreme Court granted Hoyle's petition for discretionary review on the issue, and, in a 3-2 decision, affirmed the decision of the appeals court. *State v. Hoyle,* 140 Idaho 679, 688, 99 P.3d 1069, 1073, 1078 (Idaho 2004). Stating that the majority had not addressed Hoyle's double jeopardy claim, Justice Eismann concluded in dissent that the annotated verdict form was ambiguous about the basis on which the jury reached its not guilty verdict because the jury might have determined that the State did not prove an element of racketeering (such as the pattern of racketeering activity). *See id.* at 1080 (Eismann, J., dissenting). Given this ambiguity, the dissent continued, Hoyle's subsequent prosecution in Case 795 should be barred under the Double Jeopardy Clause

because the independent charges were lesser included offenses of racketeering, as charged in Count B, for which Hoyle was acquitted with the "not guilty" verdict. *See id.* at 1081-82 (Eismann, J., dissenting). Justice Eismann's dissent prompted a petition for rehearing on the double jeopardy issue, which the Idaho Supreme Court summarily denied.

Hoyle next filed a petition for writ of habeas corpus under 28 U.S.C. § 2241(c)(3) in the United States District Court for the District of Idaho.[3] The district court denied the petition on the ground that the verdict form did not reflect an unqualified not guilty verdict on Count B because of the seven excepted predicate acts, concluding that the handwritten notations on the verdict form could not be disregarded as mere surplusage. The district court also determined that the record supported this interpretation. In particular, the district court found: (1) that the jury had made the obvious communication in open court to the trial judge that it was deadlocked on some predicate acts; (2) that because of the lack of unanimity, Hoyle's trial counsel requested a mistrial; and (3) that the special verdict form required the jury to indicate "not guilty" if the state had not proven two or more incidents of racketeering. The district court concluded that "[b]ecause the jurors could not agree whether Petitioner had committed these seven acts, it

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[3] "The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States. . . ." 28 U.S.C. § 2241(c)(3).

follows that they also did not resolve whether Petitioner committed 'at least two incidents of racketeering conduct' . . . or, if so, whether those incidents amounted to a 'pattern of racketeering activity.'" Because Hoyle was not acquitted of the entire racketeering charge, the district court held that double jeopardy did not bar prosecution of Case 795 and denied habeas relief. Hoyle timely appealed.

II

Where a petitioner seeks a writ of habeas corpus under 28 U.S.C. § 2241, which empowers district courts to provide habeas relief on pretrial double jeopardy challenges, *see Stow v. Murashige,* 389 F.3d 880, 886-87 (9th Cir. 2004), we do not apply the stringent standard set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat.1214 (codified as amended at, in relevant part, 28 U.S.C. § 2254(d)), which allows for relief from a state court judgment only where a state court decision was "contrary to" or an "unreasonable application of" clearly established federal law. *Id.* at 888.

The parties dispute the appropriate degree of deference we should give the state trial court's determinations about the annotated jury verdict form. The State argues, relying on *Sumner v. Mata,* 449 U.S. 539 (1981), and *Gonzalez v. Justices of the Mun. Court,* 382 F.3d 1 (1st Cir. 2004), *vacated and remanded,* 544 U.S. 918 (2005), that we must defer to

the state trial court's "factual finding with respect to the jury's position on the racketeering charge." Hoyle argues that the relevant facts here are undisputed regarding the central issue of the verdict form, *i.e.* its notations and the manner in which it was returned. Hoyle further contends that, given these uncontroverted facts, it is the legal effect of the annotated verdict form that is at issue – a mixed question of law and fact that must be reviewed de novo.

We conclude that the traditional pre-AEDPA standard of review applies – we review factual findings with a presumption of correctness and conclusions of law *de novo*. *See Allen v. Roe,* 305 F.3d 1046, 1050 (9th Cir. 2002); *see also Stow,* 389 F.3d at 888. Yet there is a genuine issue of whether the trial court's determination that the annotated verdict form did not constitute an acquittal of all the racketeering charges is a finding of fact or a legal conclusion. On this issue we agree with Hoyle that the effect of the annotated "not guilty" verdict – whether it acquitted Hoyle as to the racketeering conduct alleged under Count B – is a mixed question of law and fact. *See Thompson v. Keohane,* 516 U.S. 99, 110 (1995) (holding that under pre-AEDPA standards, factual findings made by a state court are entitled to a presumption of correctness, but federal courts are not required to defer to state court determinations of mixed questions of law and fact); *see also In re Indian Gaming Related Cases,* 331 F.3d 1094, 1107 (9th Cir. 2003) ("A mixed question of law and fact exists where the relevant facts are undisputed and the question is

whether those facts satisfy the applicable legal rule."); *Suzy's Zoo v. Comm'r of Internal Revenue,* 273 F.3d 875, 878 (9th Cir. 2001) ("A mixed question of law and fact exists when primary facts are undisputed and ultimate inferences and legal consequences are in dispute."). We thus review de novo the district court's conclusions about the legal import of the annotated jury verdict, *see Stow,* 389 F.3d at 888, but will uphold any underlying factual findings absent a rebuttal of the presumption of correctness. *See Allen,* 305 F.3d at 1050.

III

The crux of the issue for us is whether the special verdict form, which featured the key notation – "except as to the seven predicate acts upon which we could not reach unanimous agreement" – next to the checked "Not Guilty" box for the Count B racketeering charges, reflected an unambiguous verdict of acquittal or a qualified verdict that excluded the seven excepted predicate acts thereby reflecting its inability to reach a unanimous verdict on Count B. If Hoyle was acquitted altogether, the constitutional prohibition against double jeopardy would bar the State from prosecuting him in Case 795 for the alleged independent acts that overlap with the predicate acts of the Count B racketeering charges. *See Brown v. Ohio,* 432 U.S. 161, 167-69 (1977); *Green v. United States,* 355 U.S. 184, 188 (1957). Hoyle contends that the not guilty verdict encompasses the entirety of Count B, and that a reviewing court may

not reconstruct a jury verdict once rendered. The State counters that Hoyle's premise is incorrect that the jury's not guilty verdict encompassed the seven predicate acts because the jury's notation explicitly qualified its verdict as lacking unanimity.

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. "It has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *Green,* 355 U.S. at 188 (internal quotation marks omitted). An acquittal on a greater offense generally bars a second prosecution for any lesser included offenses. *See Brown,* 432 U.S. at 169 ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units."); *see also Price v. Georgia,* 398 U.S. 323, 329 (1970).

The principle that an acquittal invokes double jeopardy protection, barring a new prosecution for the same offense or lesser included offenses, has been applied with vigor, and brooks no exception based on the theory that the trier of fact acquitted in error. *See Fong Foo v. United States,* 369 U.S. 141, 143 (1962) (per curiam) (holding that an acquittal prevents a second prosecution even if it is based upon an

"egregious error" of fact or law); *see also United States v. Ogles,* 440 F.3d 1095, 1100-01 (9th Cir. 2006) (holding prohibition against double jeopardy precluded government appeal of allegedly flawed judgment of acquittal under Federal Rule of Criminal Procedure 29(a)); *United States v. Ember,* 726 F.2d 522, 524 (9th Cir. 1984) ("Even if the rulings excluding the evidence were erroneous, double jeopardy bars this appeal if the district court's action is properly characterized as a judgment of acquittal."). Nonetheless, the principle of double jeopardy protection following an acquittal does not apply routinely in the case of a mistrial as a bar to a second prosecution where the trial court has declared a mistrial because the jury could not reach a unanimous verdict.[4] *See Richardson v. United States,* 468 U.S. 317, 324 (1984) ("[W]e have constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause."); *see also United States v. Scott,* 437 U.S. 82, 92 (1978)

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[4] In certain non-routine instances, the protection of the Double Jeopardy Clause remains even after a mistrial. For instance, the Double Jeopardy Clause continues to shield a "defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions." *Oregon v. Kennedy,* 456 U.S. 667, 674 (1982) (internal quotation marks omitted). It also bars retrials where "bad-faith conduct by judge or prosecutor," *United States v. Jorn,* 400 U.S. 470, 485 (1971) (plurality opinion), "threatens [harassment] of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant." *United States v. Dinitz,* 424 U.S. 600, 611 (1976) (internal quotation marks omitted).

("When a trial court declares a mistrial, it all but invariably contemplates that the prosecutor will be permitted to proceed anew notwithstanding the defendant's plea of double jeopardy."). An acquittal for double jeopardy purposes is defined as "resolution, correct or not, of some or all of the factual elements of the offense charged." *Smith v. Massachusetts,* 543 U.S. 462, 468 (2005) (internal quotation marks omitted).

In contending that the jury verdict here acquitted Hoyle of Count B, Hoyle relies on our authority in *Stow,* 389 F.3d 880, to argue that a reviewing court must accept the verdict without the benefit of subsequent reconstruction. The State responds that *Stow* can be distinguished where, as here, the jury unambiguously excepted the seven predicate acts from its not guilty verdict. The State argues that the district court properly relied on *United States v. Ailsworth,* 138 F.3d 843 (10th Cir. 1998), *United States v. Nooks,* 446 F.2d 1283 (5th Cir. 1971), and *Cook v. United States,* 379 F.2d 966 (5th Cir. 1967), to conclude that a jury's verdict must be clear and unqualified, and a reviewing court may look to the record surrounding a jury's verdict to discern a jury's intent and to give effect to that intent. We evaluate these precedents in aid of our resolution of his appeal.

In *Stow,* the defendant had been charged with attempted murder in the first degree and the second degree. 389 F.3d at 882. After the jury returned a guilty verdict for the first degree attempted murder charge and a not guilty verdict for the second degree

attempted murder charge, the trial court entered a judgment on the first degree count. The record was silent, however, as to whether defense counsel or the trial court noticed that the jury had marked "not guilty" as to the second degree count. *Id.* The record reflected that the trial judge only gave an instruction regarding attempted murder in the first degree without adding a supplemental instruction, as required under Hawaii law, that the jury should stop deliberating if it found the defendant guilty of that count. *Id.* at 884. Later, the Hawaii Supreme Court overturned the conviction, but held that the not guilty verdict for the second degree attempted murder charge did not "in substance" constitute an acquittal. *Id.* at 882, 885. This decision cleared the path for the state to mount a second prosecution against the defendant on that charge. *Id.* at 882.

Despite the possibility that there had been jury confusion or mistake, we rejected in *Stow* the Hawaii Supreme Court's theory that the "not guilty" verdict was not an acquittal "in substance," concluding that a second prosecution was barred by the "fundamental" and "absolute" prohibition against double jeopardy. *Id.* at 888. "That there cannot be further appellate inquiry into a jury's verdict is confirmed by the doctrine that even 'egregiously erroneous' jury verdicts are nonetheless a bar to a subsequent prosecution." *Id.* at 890 (quoting *Fong Foo,* 369 U.S. at 143). We held, moreover, that this prohibition applies even if there was "instructional error," *id.* at 891, or in the event of inconsistent verdicts. *See id.* at 892 (citing

United States v. Powell, 469 U.S. 57, 65 (1984)); *see also McNeil v. Middleton,* 402 F.3d 920, 921 n.2 (9th Cir. 2005).

The verdict at issue in *Stow* is distinguishable from the annotated verdict form here. The jury in *Stow* returned inconsistent verdicts that potentially arose from the trial court's oversight in not giving the supplemental instruction to halt deliberations after the jury found the defendant guilty of first degree attempted murder. *See* 389 F.3d at 884. In that context, we held that there could be no appellate inquiry into the meaning of the verdict. *See id.* at 891-92. In contrast to the jury's notations qualifying its not guilty verdict here, the jury's verdict in *Stow* did not contain any explanation that could reconcile the inconsistency between the guilty verdict for first degree attempted murder and the not guilty verdict for the lesser included offense of second degree attempted murder. The absence of any preexisting explanation by the jury on the verdict form in *Stow* is a salient difference from the annotated verdict here because the reviewing court in *Stow* was in a position where it could only "speculate" about the jury's decision to mark not guilty on the second degree attempted murder charge. *Id.* at 883.

This contextual silence in *Stow* contrasts with the record of the proceedings here that establishes with certainty that the court and parties were aware that the jury expressly excepted seven predicate acts from its verdict. After long deliberation, the jury told the trial judge that it was deadlocked on several

predicate acts under Count B. This lack of unanimity prompted Hoyle's trial counsel to request a mistrial. *See Scott,* 437 U.S. at 93 (noting that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution. . . ." (internal quotation marks omitted)); *United States v. See,* 505 F.2d 845, 854 (9th Cir. 1974) (holding, while affirming the grant of a mistrial, that "hopelessly deadlocked" jury is proper grounds for mistrial). In turn, the trial judge ascertained the jury's particular reservations by eliciting, through his instructions,[5] responses from the jury on the special verdict form. Hoyle's trial counsel acceded to this instruction that invited the jury's annotated verdict with respect to the seven predicate acts on which there was disagreement. In *Stow,* the record suggested no comparable context that disclosed the jury's intent. *See* 389 F.3d at 883. *Stow* thus does not control the inquiry here.

Absent the applicability of *Stow* or any other binding authority, we consider extra-circuit authority that permits consideration of a jury's verdict notations and the context in which the verdict was rendered to give effect to the jury's intent.

In *Ailsworth,* the Tenth Circuit held that unnecessary or irrelevant statements in a verdict form may be disregarded as surplusage, *except* "where the

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[5] "On any questions or predicate acts on which you do not unanimously agree, please . . . write down next to that "NA" for no agreement."

circumstances of the jury's recommendation cast doubt upon the unqualified nature of the verdict." 138 F.3d at 846. In that case, the defendant had been charged under a multicount indictment. *See id.* at 845-46. When the jury returned its verdict, it checked the "guilty" box on the verdict form corresponding to Count 1 but added a notation that the defendant was guilty of Count 1 "as related to Counts #26, 27 and 28 on 11/19/93 only." *Id.* at 845 (alteration omitted). The defendant claimed that the district court abused its discretion in not granting a motion for acquittal because the verdict was ambiguous and the trial judge should have inquired about the notation. *Id.* at 846.

The Tenth Circuit conceded that "[t]he district court should have made some inquiry into the meaning of the notation to resolve this qualification." *Id.* at 847. Rejecting the defendant's claim that the verdict was ambiguous, however, the Tenth Circuit held that the trial court's inaction "would require a reversal *only if* an inquiry would have revealed a reasonable interpretation of the notation which would have cast doubt on the jury's finding that Defendant conspired to commit the crimes charged in Counts 26, 27, and 28." *Id.* at 847-48 (emphasis added). Examining the verdict form "in light of the jury questions to the court, the court's answers and instructions," the *Ailsworth* court rejected alternative interpretations of the verdict form notation and concluded that the trial court did not commit reversible error because "[t]he only reasonable interpretation of the jury's notation is

that the jury was not convinced beyond a reasonable doubt that Defendant participated in the single broad conspiracy alleged in the indictment," but was convinced "that Defendant participated in a conspiracy relating to Counts 26, 27, and 28." *Id.* at 847-48.

The Tenth Circuit rule is in line with Fifth Circuit authority that a verdict is valid if it "was certain, unqualified and unambiguous considering the circumstances of the receipt of the verdict and poll of the jurors relative to their verdict." *Cook*, 379 F.2d at 968; *see also Nooks*, 446 F.2d at 1290 ("The verdict of the jury should be construed with reference to the indictment, the court's charge, and the entire record to arrive at the intention of the jury, and all fair intendments should be made to sustain the verdict.").

In *Cook*, the Fifth Circuit considered a jury verdict convicting an attorney on three counts of willfully understating net earnings from his law practice on his personal income tax returns. 379 F.2d at 967-68. Despite the "guilty" verdict, the jury added a handwritten note at the bottom of the verdict form requesting that the court give the defendant "every degree of leniency." *Id.* at 968. When the jury was polled, moreover, a majority of jurors responded, "Guilty, based on the note at the bottom," or with similar language. *Id.* at 969. The trial court rejected defense counsel's motion that the trial court inquire whether the jury's vote was qualified by the addition of the note because "the verdict is not ambiguous, it speaks for itself." *Id.* at 969 n.3. Under those exceptional circumstances, the Fifth Circuit reversed the

trial court because it committed reversible error by not granting defense counsel's request to inquire into the jury's exact intent, where the court of appeals had "serious doubt that the jury did not qualify its verdict of guilty [by] predicating and conditioning it on the request for 'every degree of leniency possible.'" *Id.* at 970. The *Cook* court held "that the jury's verdict, taken together with the court's comments to the jury on receipt of the verdict and the responses of each juror to the court's poll, showed an obscurity – a lack of definite and precise meaning – and that obscurity having rendered the verdict doubtful and not having been clarified by the trial court . . . was fatal to it." *Id.* at 971. *But cf. Rogers v. United States,* 422 U.S. 35, 38 (1975) (noting that jury requests for leniency on the verdict form are usually deemed surplusage); *United States v. Lee,* 532 F.2d 911, 915 (3rd Cir. 1976) (affirming trial court's acceptance of verdict with appended note requesting leniency where the polled jurors, unlike in *Cook,* "indicated their agreement with the guilty verdict without equivocation or qualification whatsoever"). In short, the Fifth Circuit concluded that, in light of the annotated verdict, "the circumstances strongly suggest that there would have been no agreement as to the verdict unless the recommendation of leniency was also accepted," and that the "effect of the recommendation, steadfastly adhered to on the poll, was to nullify the verdict." *Cook,* 379 F.2d at 970. The court relied upon the general rule: "There is no verdict as long as there is any uncertainty or contingency to the finality of the jury's determination." *Id.*

Although these extra-circuit cases did not involve questions of double jeopardy, these precedents are persuasive in providing criteria for determining the intent and effect of an annotated verdict. We thus adopt a rule that a reviewing court may look to notations on a verdict form, other than surplusage, to clarify the jury's intent and the effect of its verdict in order to ascertain if the defendant has been acquitted of a particular charge. In addition, in cases where the jury has written notations on the verdict form, but in *only* those cases, a reviewing court may look to the context of the verdict, including jury requests for clarification, a trial judge's instructions, polling of the jury, and other court proceedings evidenced in the record that bear on a reasonable interpretation of what the jury has intended in its annotated verdict.[6]

Here, it is beyond question that all parties concerned understood that the jury was hung on the seven excepted predicate acts, and that is the conclusion reasonably drawn from the verdict form notations. The trial judge properly sought to clarify how

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[6] Our holding does not undermine the robust Double Jeopardy jurisprudence recognizing that where a verdict form states simply "not guilty," courts may not inquire into the surrounding context to determine the jury's intent. As we have stated time and again, a "not guilty" verdict is a "not guilty" verdict, even where we strongly suspect a jury mistake, or even an "egregious error." *See Stow*, 389 F.3d at 890-92 (citations omitted). Here, only because the verdict form itself was ambiguous may we engage in further investigation to determine the jury's intent.

the jury should proceed if it could not reach unanimous agreement on all predicate acts by the instruction that the jurors note where they were in disagreement as to any predicate acts. The record also establishes that the jury faithfully complied with the trial judge's instruction and consistently noted its lack of unanimity about the excepted seven predicate acts on the special verdict form.

As to the content of the notations, the interpretation of the verdict form in Justice Eismann's dissent, which Hoyle adopts in its entirety, does not convince us, but we set out the reasoning to explain our contrary view:

> Another possible interpretation is that the notation somehow qualified the verdict of not guilty of racketeering. The jury was not asked to clarify the meaning of the notation. It is sufficient, however, that the verdict could have been based upon a finding that the State had failed to prove one essential element of racketeering (such as a pattern of racketeering activity). In that circumstance, the jury would be required to return a not guilty verdict to racketeering even if it could not unanimously agree upon all of the alleged predicate acts.

Hoyle, 99 P.3d at 1080 (Eismann, J., dissenting). In our view, Justice Eismann's observations do not adequately account for the notation that excepted seven predicate acts. The proffered interpretation also cannot be reconciled with the jury's responses to

the trial judge's questions or the structure of the special verdict form.

The correctness of the district court's interpretation of the verdict form must be examined in light of the elements of racketeering under the Idaho statute.[7] There was no dispute that Hoyle qualified as a "person," *see* Idaho Code Ann. § 18-7803(b), and that Hoyle Insurance qualified as an "enterprise." *See* Idaho Code Ann. § 18-7803(c). The critical issue for the jury was whether the State adduced sufficient evidence to prove Hoyle committed at least two predicate acts. *See* Idaho Code Ann. § 18-7803(a)(1)-(12) (enumerating chargeable racketeering offenses). If so, it was incumbent on the State to prove that any two predicate acts were sufficiently related to constitute a pattern of racketeering activity. *See State v.*

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[7] Under Idaho Code Ann. § 18-7804(a), Hoyle was charged with both participation in a racketeering activity and investment of proceeds derived from a racketeering activity. The statute sets forth offenses that may be charged as predicate acts to racketeering, including grand theft and insurance fraud, *see* Idaho Code Ann. § 18-7803(a)(2) and (10), which were the particular charges relevant to the seven excepted predicate acts. Idaho Code Ann. § 18-7803(d) defines "pattern of racketeering activity" as engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided . . . that the last of such incidents occurred within five (5) years after a prior incident of racketeering conduct.

Nunez, 133 Idaho 13, 18, 981 P.2d 738, 743 (Idaho 1999); Idaho Code Ann. § 18-7803(d).

The jury's responses to Count B, Questions 1A and 1B suggest in harmony that the jury was deadlocked on the issue of whether Hoyle had committed the seven excepted predicate acts. In response to Question 1A – "Did the defendant *commit* at least two incidents of racketeering conduct" (emphasis added) – the jury checked "No," but noted "except as to the seven predicate acts upon which we could not reach unanimous agreement." The jury then specified in its response to Question 1B the particular seven predicate acts on which there was no agreement. In light of these questions and responses, we think it must inescapably be inferred that the jury could not agree whether the State proved that Hoyle committed the seven excepted predicate acts.

Count B, Question 1C directed the jury to answer the following query: "Did the incidents of racketeering conduct *that you find were proven* have the same or similar incidents, results, victims, methods of commission or were they otherwise so interrelated by distinguishing characteristics that they were not isolated incidents?" (emphasis added). The jury did not answer this question. Because Question 1C called for a determination on the relatedness element only with respect to "proven" racketeering conduct, the fact that the jury left the answer to Question 1C blank thus reasonably must mean that the jury did not reach this issue and that it was deadlocked on the

issue of Hoyle's commission of the seven predicate acts.

The jury ultimately checked "not guilty" at the bottom of the special verdict form in response to sub-Question 1D because the special verdict form *required* the jury to do so in the event of a negative answer to sub-Question 1A. ("If your answer to either question 1A or 1C is 'NO,' then you must answer both parts of 1D 'NOT GUILTY.' ") The fact that the jury provided a parallel qualification from its response to Question 1A in response to Question 1D can only reasonably mean that the not guilty verdict did not encompass the seven predicate acts. As in *Ailsworth,* we reject Hoyle's argument based on his interpretation of the jury's notations on the verdict form that the intent of the jury was ambiguous. *See* 138 F.3d at 847-48. In light of the consistent qualifications of its verdict on Count B in response to Questions 1A, 1B and 1D, and the absence of a response to Question 1C, the district court did not err in its interpretation of the verdict form.

The notations on the verdict form could only reasonably mean that the jury could not reach a unanimous verdict on Count B as to the excepted seven predicate acts because it could not agree on whether Hoyle committed the seven predicate acts. As discussed above, the context of the proceeding unmistakably reinforces this reasonable interpretation because the jury was deadlocked prior to responding to the trial judge's instruction prompting

Hoyle's motion for a mistrial, the record documents the jury's request for clarification and the trial judge's responsive instruction, and the jury was polled about the predicate acts on which there was no agreement. The language and context of the jury's notations reflect that the jury did not return an unambiguous verdict of not guilty on Count B. *See Ailsworth,* 138 F.3d at 846 (cautioning that jury's notations may not be disregarded when "the circumstances of the jury's recommendation cast doubt upon the unqualified nature of the verdict"). Because the jury excepted from its verdict the seven predicate acts on which it could not agree, the trial court correctly refused to acquit Hoyle of Count B because the verdict was not "a resolution . . . [of] all of the factual elements of the offense charged." *Smith,* 543 U.S. at 468. The trial court appropriately declared a mistrial, which leaves the State unimpeded to prosecute Case 795 without running afoul of the Double Jeopardy Clause.

AFFIRMED.

APPENDIX A

IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF ADA

STATE OF IDAHO, Plaintiff, vs. RICHARD HOYLE Defendant.	Case No. H9700620 **VERDICT** (Filed Jun. 12, 1999)

We the jury in the above entitled case return the following verdict:

COUNT A

What is your verdict as to Count A – Soliciting the Destruction of Evidence?

Guilty _____

Not Guilty ✓ [/s/ EJ]

COUNT B

1A. Did the defendant commit at least two incident of racketeering conduct?

Yes _____

No ✓

[except as to the seven predicate acts upon which we could not reach unanimous agreement /s/ EJ]

If you answered Question 1A "NO" please skip questions 1B and 1C and go to question 1D.

1B. Check the appropriate box to reflect your verdict with respect to each of the following predicate acts.

Predicate Act 1 (Insurance Fraud)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 2 (Forgery)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 6 (Grand Theft)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 7 (Grand Theft)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 9 (Grand Theft)

Guilty _____ [NO AGMT

Not Guilty _____ /s/ EJ]

Predicate Act 10 (Grand Theft)

Guilty	_____	[NO AGMT
Not Guilty	_____	/s/ EJ]

Predicate Act 11 (Grand Theft)

Guilty	_____	[NO AGMT
Not Guilty	_____	/s/ EJ]

Predicate Act 12 (Grand Theft)

Guilty	_____
Not Guilty	✓ [/s/ EJ]

Predicate Act 24 (Grand Theft)

Guilty	_____
Not Guilty	✓ [/s/ EJ]

Predicate Act 30 (Grand Theft)

Guilty	_____
Not Guilty	✓ [/s/ EJ]

Predicate Act 31 (Grand Theft by Deception)

Guilty	_____
Not Guilty	✓ [/s/ EJ]

Predicate Act 39 (Grand Theft)

Guilty	_____
Not Guilty	✓ [/s/ EJ]

Predicate Act 40 (Grand Theft)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 41 (Grand Theft)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 43 (Grand Theft)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 48 (Grand Theft)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 52 (Grand Theft)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 53 (Grand Theft)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 62 (Grand Theft)

Guilty _____ [NO AGMT

Not Guilty _____ /s/ EJ]

Predicate Act 90 (Grand Theft)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 108 (Insurance Fraud)

Guilty _____ [NO AGMT

Not Guilty _____ /s/ EJ]

Predicate Act 109 (Forgery)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 110 (Insurance Fraud)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 111 (Insurance Fraud)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 114 (Forgery)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 115 (Insurance Fraud)

Guilty _____ [NO AGMT

Not Guilty _____ /s/ EJ]

Predicate Act 117 (Insurance Fraud)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 118 (Insurance Fraud)

Guilty _____ [NO AGMT

Not Guilty _____ /s/ EJ]

Predicate Act 119 (Insurance Fraud)

Guilty _____

Not Guilty ✓ [/s/ EJ]

Predicate Act 120 (Insurance Fraud)

Guilty _____

Not Guilty ✓ [/s/ EJ]

1C. Did the incidents of racketeering conduct that you find were proven have the same or similar incidents, results, victims, methods of commission or were they otherwise so interrelated by distinguishing characteristics that the [sic] were not isolated incidents?

Yes _____

No _____

1D. (If your answer to either Question 1A or 1C is "NO", then you must answer both parts of 1D "NOT GUILTY".)

Considering your answers to the foregoing questions under the heading "Count B", and considering all the

other required elements of the crime of racketeering, you must decide whether the state proved or failed to prove beyond a reasonable doubt that the defendant committed the crime of racketeering under the "investment" theory and the "participation" theory.

Racketeering under the "investment" theory:

Guilty _____

Not Guilty ✓

Racketeering under the "participation" theory:

Guilty _____

Not Guilty ✓

[except as to the seven predicate acts upon which we could not reach unanimous agreement. /s/ EJ]

COUNT E

What is your verdict as to Count E – Solicitation of Grand Theft?

Guilty _____

Not Guilty ✓ [/s/ EJ]

Dated this 12th day of June, 1999.

/s/ [Illegible]
MODERATOR

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RICHARD W. HOYLE, Petitioner, v. ADA COUNTY DISTRICT COURT, STATE OF IDAHO, and LAWRENCE WASDEN, Attorney General, State of Idaho, Respondents.	)	Case No. CV 05-0063-S-EJL **MEMORANDUM ORDER**

On February 10, 2006, the Court denied Richard Hoyle's Petition for Writ of Habeas Corpus in a Memorandum Decision and Order. Judgment was entered the same day. Petitioner has since filed a Motion to Alter or Amend Judgment, which is ripe for a decision. This matter will be resolved on the briefs and the record without oral argument.

I.
STANDARD OF LAW

Reconsideration of a final judgment under Federal Rule of Civil Procedure 59(e) is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani,* 342 F.3d 934, 945 (9th Cir. 2003). A losing party cannot use a Rule 59(e) motion to relitigate old

matters or to raise arguments that could have been raised before the entry of judgment. *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). As a result, there are four limited grounds upon which a motion for reconsideration may be granted: (1) the motion is necessary to correct manifest errors of law or fact; (2) the moving party presents newly discovered or previously unavailable evidence; (3) the motion is necessary to prevent manifest injustice; or (4) there is an intervening change in the law. *Turner v. Burlington North. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003) (citation omitted).

II.

DISCUSSION

In its Memorandum Decision, the Court determined that the jury at Petitioner's first trial did not acquit him of racketeering and, as a result, the Double Jeopardy Clause of the Fifth Amendment did not bar a new prosecution for substantive offenses that the state courts had concluded were lesser included offenses of the racketeering charge. (Docket No. 25, pp. 7-12.) For the reasons that follow, Petitioner has not persuaded the Court to reconsider this decision.

Petitioner first argues that the Court erroneously relied upon three federal cases, which he contends are irrelevant to the issues at hand. *See United States v. Ailsworth*, 138 F.3d 843, 846 (10th Cir. 1998); *Cook v. United States*, 379 F.2d 966, 970 (5th Cir. 1967);

United States v. Nooks, 446 F.2d 1283, 1290 (5th Cir. 1971). The Court cited these cases for the general principle that a jury's verdict must be clear and unqualified, and when it appears that a jury may not have returned an unqualified verdict, a reviewing court may look to the surrounding circumstances to discern the jury's intent and to give effect to that intent. Petitioner has not convinced the Court that its citation to these cases was incorrect or inapplicable. If the jury at his first trial had in fact returned a unanimous and unqualified not guilty verdict on racketeering, which it did not, then Petitioner's argument that it would be improper to "second-guess" that verdict may have merit, even if the verdict was based upon an obvious error of fact or law. The cases upon which Petitioner relies involve that type of factual situation, but that is simply not what occurred here.

Petitioner next argues that the Court improperly focused on the predicate acts of the racketeering charge and disregarded the possibility that a not guilty verdict could have been based upon the jury's decision that the State had failed to prove some other element of the crime. Petitioner seems to suggest that the jury's note to the trial court that it was deadlocked on the predicate acts, and its markings on the verdict form, can be explained by the jury's apparent belief that it was required to reach a unanimous agreement on each act regardless of its decision as to the other elements. Petitioner, however, has not pointed to anything in the record that would show why the jury would have been laboring under this

mistaken impression. To the contrary, if the jury had determined that the State did not prove one of the other elements of the crime, it would have immediately ceased its deliberations and returned a clear, unqualified, and unanimous verdict of not guilty, in accordance with its instructions. *See* State's Lodging A-12, Instruction No. 15 and Substituted Instruction No. 16 ("[i]f the state failed to prove any one or more of the required facts . . . you shall find the defendant not guilty of Racketeering"). There would have been no need to continue deliberating on the predicate acts, advise the trial court of an impasse, or insert qualifying remarks on the verdict form.

Accordingly, the Court adheres to its previous decision that neither the verdict form nor the circumstances surrounding its completion reflect a unanimous not guilty verdict on the racketeering charge. Petitioner's Motion will be denied.

III.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Petitioner's Motion to Alter or Amend Judgment (Docket No. 27) is DENIED.

[SEAL] DATED: **April 7, 2006**

/s/ Edward J. Lodge
U. S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RICHARD W. HOYLE, Petitioner, v. ADA COUNTY DISTRICT COURT, STATE OF IDAHO, and LAWRENCE WASDEN, Attorney General, State of Idaho, Respondents.	Case No. CV 05-0063-S-EJL **MEMORANDUM DECISION AND ORDER**

Before the Court in this habeas corpus matter is Respondents' Motion for Dismissal on the Merits. After a careful review of the briefing and the record, the Court has determined that this matter will be submitted without oral argument. D. Idaho L. Civ. R. 7.1(d).

For the reasons set forth more fully herein, the Court concludes that Respondents' Motion will be granted and the Petition for Writ of Habeas Corpus, seeking relief under the Double Jeopardy Clause of the Fifth Amendment, will be denied.

I.
BACKGROUND

In Ada County Case No. 97-00620 ("Case 620"), the State of Idaho charged Petitioner with several

felony counts in relation to the management of his insurance business, Hoyle & Associates Insurance Agency, including one count of racketeering (Count B) predicated upon several alleged criminal acts of grand theft, forgery, and insurance fraud. By the time the case went to the jury, three counts remained, one of which was the racketeering count. Near midnight on the third day of deliberations, the jury sent the following note to the trial court:

> We have reached a unanimous verdict on Counts A and E. As to Count B, we cannot reach a unanimous agreement on a number of predicate acts. Do you want us to note on the verdict form those predicate acts to which we cannot agree? We have made extensive effort to obtain an agreement and don't feel we can. Please let us know how you would like us to proceed.

State's Lodging A-6, p. 4.

After a discussion between the parties and the trial court regarding the note, Petitioner's counsel moved for a mistrial on Count B, claiming that "Count B at this point is not fully decided." *State's Lodging A-6,* p. 3. The trial court indicated that it would take the matter under advisement.

The court read the note back to the jury and questioned the jurors whether continued deliberation would serve any purpose, to which they responded negatively. With the consent of the parties, the court then directed the jury to return to the jury room and

fill out the verdict form, indicating its "answers to charges, to questions, and to predicate acts on which you have unanimously agreed . . . On any questions or predicate acts on which you do not unanimously agree, please ask the moderator simply to write down next to that "NA" for no agreement." *State's Lodging A-6,* p. 5.

The jury returned with a verdict of not guilty on Counts A and E. The verdict form with respect to the racketeering charge, Count B, was divided into several questions. The jury responded to the first question, "did the defendant commit at least two incident [sic] of racketeering conduct," by checking "no," but wrote immediately below, "except as to the seven predicate acts upon which we could not reach unanimous agreement." *State's Lodging A-11,* p. 847. For twenty-three of the thirty remaining predicate acts listed on the form, the jury checked "not guilty," but for seven other acts, the presiding juror wrote "No Agmt" to the side. *State's Lodging A-11,* p. 847-51. Finally, when asked whether the State had proven beyond a reasonable doubt whether Petitioner had committed racketeering under an "investment" theory or a "participation" theory, the jury checked "not guilty" for both, but again wrote immediately below, "except for the seven predicate acts upon which we could not reach unanimous agreement." *State's Lodging A-11,* p. 851.

The trial court read the verdict form in open court and asked the jury, "is that your verdict on which matters you have agreed [and] is that also your

decision on the matters to which you have not agreed?" *State's Lodging A-6,* pp. 8-9. The jury affirmed. When polled individually, all jurors also affirmed. The trial court entered a judgment of acquittal on Counts A and E, and dismissed the twenty-three predicate acts upon which the jury found Petitioner not guilty.

Petitioner thereafter filed Motion for Judgment of Acquittal on Count B, arguing, for the first time, that the jury had returned a not guilty verdict on the racketeering charge, and that any retrial on that charge would violate the constitutional prohibition against double jeopardy. After hearing argument, the trial court denied the Motion, concluding that the jury had not reached a unanimous decision on Count B based upon the remaining seven predicate acts. The court declared a mistrial as to Count B, and the matter was set for a new trial.

On the day that the second racketeering trial was set to begin, the State announced that it intended to proceed on a new indictment in Case No. 0000795 ("Case 795"). In that case, Petitioner was charged with two counts of grand theft and three counts of insurance fraud, which were among the unresolved predicate acts in the racketeering prosecution. The trial court dismissed Case 620 without prejudice to the State's right to proceed on the new charges in Case 795.

Petitioner appealed, claiming, in relevant part, that any new prosecution was prohibited under

double jeopardy principles. Both the Idaho Court of Appeals and the Idaho Supreme Court rejected that argument and affirmed the trial court's decision to order a mistrial on Count B based upon the jury's failure to agree. *State v. Hoyle,* 2003 WL 721617 (Idaho Ct. App. 2003); *State v. Hoyle,* 99 P.3d 1069 (Idaho 2004).

Petitioner has now filed a Petition for Writ of Habeas Corpus in this Court, in which he again contends that a second trial is prohibited by the Double Jeopardy Clause of the Fifth Amendment. Petitioner has been released on his own recognizance pending trial in Case 795, and it appears that a trial date has not been set.

Respondents have submitted a Motion for Dismissal on the Merits, and United States Magistrate Judge Mikel H. Williams has reassigned the case to this Court for resolution. The matter is fully briefed and ready for disposition.

II.

STANDARDS OF LAW

A. Habeas Standards

Although Petitioner Hoyle has been released on his own recognizance pending trial, he is "in custody" for purposes of habeas review. *Justices of the Boston Mun. Ct. v. Lydon,* 466 U.S. 294, 301-02 (1984). Because Petitioner's custody does not arise as a result of a state court judgment of conviction, the jurisdictional

basis for this case is the general habeas statute, 28 U.S.C. § 2241(c)(3), rather than 28 U.S.C. § 2254. *Stow v. Murashige,* 389 F.3d 880, 885 (9th Cir. 2004). A pretrial claim of double jeopardy, moreover, presents an exception to the general rule that a federal court must abstain from interfering in ongoing state criminal proceedings. *Mannes v. Gillespie,* 967 F.2d 1310, 1312 (9th Cir. 1992) (citing *Younger v. Harris,* 401 U.S. 37 (1971)).

Therefore, after deferring to any state court findings of fact and interpretations of state law, this Court must independently determine whether Petitioner has shown that he is being held in violation of the United States Constitution. *Stow,* 389 F.3d at 885-86.

B. Double Jeopardy Standards

The Double Jeopardy Clause of the Fifth Amendment, made applicable to the States by the Fourteenth, provides that no person shall "subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. AMEND. V. As relevant here, the Clause protects a criminal defendant against a second prosecution for the same offense after an acquittal. *See, e.g., Ohio v. Johnson,* 467 U.S. 493, 497-98 (1984) (citation omitted).

An acquittal for double jeopardy purposes is defined as "a resolution, correct or not, of some or all of the factual elements charged." *Smith v. Massachusetts,* 543 U.S. 462, ___, 125 S.Ct. 1129, 1134 (2005)

(quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977)). An acquittal will prevent a second prosecution even if it is based upon an egregious error of fact or law. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); *Sanabria v. United States*, 437 U.S. 54, 64 (1978). Additionally, an acquittal on a greater offense generally bars a second prosecution for any lesser included offenses. *See Brown v. Ohio*, 432 U.S. 161, 167-68 (1977) (*citing Blockberger v. United States*, 284 U.S. 299 (1932)).

If a trial court, however, has declared a mistrial based upon the jury's inability to come to a unanimous agreement, the Double Jeopardy Clause will not prohibit a new trial, provided that a reviewing court has not otherwise entered the equivalent of a judgment of acquittal. *Richardson v. United States*, 468 U.S. 317, 324, 326 (1984); *Burks v. United States*, 437 U.S. 1, 11-12 (1978).

With these principles in mind, the Court turns to the claims in this case.

III.

DISCUSSION

Petitioner makes two primary arguments in support of his claim that the Double Jeopardy Clause prohibits retrial. First, he contends that the jury, either mistakenly or intentionally, returned a written not guilty verdict on the racketeering charge and, consequently, he was acquitted of that charge.

Petitioner asserts that this alleged acquittal prevents the State from retrying him in Case 795 for substantive offenses that the state courts have determined were lesser included offenses of the original racketeering charge. Second, Petitioner contends that regardless whether he was acquitted at the first trial, the evidence was legally insufficient to convict him during that proceeding, and he therefore cannot be retried in Case 795.[1] *See Petition for Writ of Habeas Corpus*, pp. 6-29; *Petitioner's Brief on the Merits*, p. 2.

A. The Jury Failed to Reach a Unanimous Decision on Count B

Petitioner relies heavily upon his contention that because the jury checked "not guilty" on the verdict form, he was acquitted of racketeering, and he faults the state courts for "look[ing] behind the verdict form" to conclude that the jury was deadlocked on Count B

[1] To the extent that Petitioner also contends that he cannot be retried for the greater offense of *racketeering*, which the State has dismissed and has not included in Case 795, the Court agrees with Respondents that such a claim would not be ripe until Petitioner has been recharged with racketeering, or it is clear that the State intends to prosecute him for that crime. *See United States v. Corona*, 34 F.3d 876, 882 n.5 (9th Cir. 1992) (double jeopardy claim becomes ripe once a second prosecution is initiated). Until then, any claim in this respect "rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (citations omitted).

and that a mistrial was proper. *Petitioner's Brief on the Merits,* pp. 6-8.

Petitioner's argument assumes too much, as the verdict form does not reflect an unqualified verdict on Count B. Rather, after the jury checked not guilty with respect to whether Petitioner committed racketeering under the investment or participation theories, it immediately noted, "except as to the seven predicate acts upon which we could not reach unanimous agreement." *State's Lodging A-11,* p. 851. This is also true of the jury's answer to the question whether Petitioner committed two or more "incidents of racketeering conduct." *State's Lodging A-11,* p. 847. These notations are not mere surplusage that can be ignored, as Petitioner suggests, but instead qualify and explain the jury's findings, or lack thereof, on the racketeering charge. *Cf. United States v. Ailsworth,* 138 F.3d 843, 846 (10th Cir. 1998) (verdict must be certain, unqualified, and unambiguous); *see also Cook v. United States,* 379 F.2d 966, 970 (5th Cir. 1967).

Nor has Petitioner persuaded the Court that the verdict from [sic] must be viewed in isolation from the existing record when the record can provide a context for determining the jury's intent and giving effect to that intent. *See United States v. Nooks,* 446 F.2d 1283, 1290 (5th Cir. 1971) (court may look to the pleadings, the jury charge, and the entire record); 23A C.J.S. *Criminal Law* § 1410 (1989) (court may construe uncertain verdict by reference to the record). This is not a matter of impeaching or second guessing a clear written verdict, but instead involves a review

of contemporaneous events to discern whether the jury agreed unanimously on a verdict in the first instance. Such a review in this case supports the state courts' conclusion that Petitioner was not acquitted.

The jury deliberated for three days. Near midnight of the final day, it informed the trial court that "[w]e have reached a unanimous verdict on Counts A and E. As to Count B, we cannot reach a unanimous agreement on a number of predicate acts." *State's Lodging A-6,* p. 4. Petitioner's trial counsel interpreted the jury's note as indicating a lack of agreement on Count B, and he requested a mistrial on the racketeering charge. This interpretation was reasonable; given that the jury had deliberated for several hours over the course of three days and had indicated that it had reached a unanimous verdict on Counts A and E, the obvious implication is that the jury could not reach a unanimous verdict on Count B because it was hung on certain predicate acts. Further, the jury noted that "[w]e have made extensive effort to obtain an agreement and don't feel we can," and, in open court, indicated that further deliberation would be useless. With Petitioner's acquiescence, the trial court then directed the jury to note on the verdict form those matters on which it agreed and those matters on which it did not agree.

In accordance with the trial court's direction, the jury completed the form. It returned a not guilty verdict on Counts A and E. *State's Lodging A-11,* p. 847. Regarding Count B, the jury initially noted that

the State had not proven two or more incidents of racketeering conduct, "except as to the seven predicate acts upon which we could not reach unanimous agreement." *State's Lodging A-11,* p. 847. Because the jury answered this question negatively, the verdict form *required* it to mark "not guilty" in response to whether Petitioner had committed racketeering under the investment or participation theory. *State's Lodging A-11,* p. 851 ("If your answer to either Question 1A or 1C is 'NO' then you must answer both parts of 1D 'NOT GUILTY'.") The jury followed this direction, but again immediately qualified its markings with, "except as to the seven predicate acts upon which we could not reach unanimous agreement." *Id.* The jurors affirmed that the verdict form reflected their "verdict on which matters [they] have agreed" and their "decision" on the matters to which they could not agree. *State's Lodging A-6,* pp. 8-9. They did not specifically affirm a verdict of not guilty on Count B, and the trial court did not enter a judgment based upon a not guilty verdict on that count.

It is therefore clear from the record that the jury did not reach a consensus on the ultimate question of guilt on Count B. While the jurors agreed that twenty-three predicate acts had not been proven, they could not agree on the remaining seven predicate acts. Because the jurors could not agree whether Petitioner had committed these seven acts, it follows that they also did not resolve whether Petitioner committed "at least two incidents of racketeering conduct" (that is, predicate acts), or, if so, whether

those incidents amounted to a "pattern of racketeering activity." *See State's Lodging A-12 (Jury Instruction Nos. 15, 16, and Substituted No. 16).*[2] This conclusion is consistent with the entire record, including the markings on the verdict form itself. Thus, the jury did not return a verdict on Count B.

It is for this reason that *Stow v. Murashige,* 389 F.3d 880 (9th Cir. 2004), upon which Petitioner relies, is inapposite. There was no question in *Stow* whether the jury had agreed on a not guilty verdict, the only issue was whether the verdict would prohibit a second prosecution because it had apparently been based upon an error of law. The Ninth Circuit held that the second prosecution was barred, and it chided the state court for attempting to determine whether the verdict amounted to an acquittal in "substance" or only in "form." *Id.* at 889-89, 891. In reaching that conclusion, the Ninth Circuit noted that "all that is left of the jury's intent is the "Not Guilty" verdict." *Id.* at 888.

The foundational matter that was assumed in *Stow* – that the jury had returned a unanimous verdict – is precisely the question in this case. The issue here is not whether a jury's verdict amounted to an acquittal in "substance" or "form," or whether a court is permitted to second guess an acquittal to

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[2] Respondents' objection to expanding the record to include the jury instructions is overruled. The instructions are relevant to the issues before the Court.

determine if it is correct, but whether the jury actually came to a unanimous decision. *Stow,* and the other cases that Petitioner cites, do not speak directly to this issue.

Because Petitioner was not acquitted of racketeering, the Double Jeopardy Clause will not prohibit a second trial in Case 795 on that basis.

B. Petitioner's Claim of Insufficient Evidence is Not Cognizable

Petitioner next argues that regardless whether the jury reached a verdict on Count B, he is entitled to habeas relief because the State failed to present sufficient evidence to prove the racketeering charge beyond a reasonable doubt at the first trial and, more specifically, to prove the five predicate acts that are now charged as separate offenses in Case 795. It is unclear whether Petitioner relies solely upon the Double Jeopardy Clause, or whether Petitioner is attempting to raise an independent claim of insufficient evidence under the Due Process Clause of the Fourteenth Amendment. Neither basis will support a claim for relief.

In *Richardson v. United States,* 468 U.S. 317, 324, 326 (1984), the United States Supreme Court held that when a mistrial has been declared because of a hung jury, the Double Jeopardy Clause will not bar a new trial regardless whether the evidence was legally sufficient to support a conviction at the first trial, unless a reviewing court has entered the

equivalent of a judgment of acquittal. *Id.* This is because the original jeopardy has not been terminated by a constitutionally significant event. *Id.* at 326.

Petitioner attempts to distinguish *Richardson* on procedural grounds, but the rule of law is directly on point. In present case, the jury did not return a verdict on racketeering, and no reviewing court has entered the equivalent of a judgment of acquittal. Accordingly, jeopardy has not yet terminated, and Petitioner does not have a valid double jeopardy claim based upon insufficient evidence at the first trial.

The Fourteenth Amendment will not provide an independent basis for relief. It is true that in *Jackson v. Virginia,* 443 U.S. 307 (1979), the Supreme Court held that a defendant's right to due process of law is violated when he or she has been *convicted* based upon evidence that would be insufficient to convince any rational finder of fact of the defendant's guilt beyond a reasonable doubt. Petitioner, though, does not stand convicted of any crime, and he has cited no authority for the proposition that the Due Process Clause is offended by the State's alleged failure to present sufficient evidence at a trial that ended in a hung jury. *See, e.g., United States v. Brack,* 747 F.2d 1142, 1148 (7th Cir. 1985) ("the protection of the Due Process Clause focuses on conviction, not retrial").

The Court is also not persuaded that it is required to address a sufficiency of the evidence claim

because the Idaho Supreme Court reviewed the evidence at the original trial. Petitioner's case was before the state appellate courts, in part, on appeal from the denial of a motion for judgment of acquittal. A state appellate court's decision to review the denial of a motion for judgment of acquittal after a mistrial has been declared is governed by the state's rules of criminal and appellate procedure. As a result, this issue is solely a matter of state law that cannot be reviewed in a federal habeas proceeding. *Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991).

Petitioner's contention that he has a "right to address the merits of the state court's decision" is only true to the extent that a constitutional claim is properly before this Court. *Petitioner's Brief on the Merits,* p. 10. Because Petitioner has neither been acquitted nor convicted in state court, he does not have a cognizable federal claim based upon a perceived lack of sufficient evidence at his original racketeering trial.

For all of these reasons, the Petition for Writ of Habeas Corpus shall be denied.

IV.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Respondents' Motion for Dismissal on the Merits (Docket No. 12) is GRANTED.

IT IS FURTHER ORDERED that the Petition for Writ of Habeas Corpus is DENIED.

[SEAL] DATED: **February 10, 2006**

/s/ Edward J. Lodge
Honorable Edward J. Lodge
S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD W HOYLE, Petitioner-Appellant, v. ADA COUNTY, IDAHO, DISTRICT COURT; LAWRENCE WASDEN, Attorney General, State of Idaho, Respondents-Appellees.	No. 06-35509 D.C. No. CV-05-00063-EJL District of Idaho, Boise ORDER (Filed Oct. 4, 2007)

Before: GOULD, PAEZ, and RAWLINSON, Circuit Judges.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.